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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of)

Implementation of Sections of the)
Cable Television Consumer Protection)
and Competition Act of 1992 -- Rate)
Regulation)

Uniform Rate-Setting Methodology

CS Docket No. 95-174

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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COMMENTS OF TIME WARNER CABLE

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Dated: February 12, 1996

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SUMMARY

As the Commission's Notice of Proposed Rulemaking ("Notice") notes, cable rates often vary between franchise areas, even in a single system, due to two factors. First, cable operators must set rates in each community based upon variables listed on the Commission's 1200 series forms, including number of subscribers and census income level. Second, each franchising authority typically imposes different franchise-related costs upon the cable operator. As a result, subscribers understandably become confused and angry when they do not understand why their neighbors in nearby communities pay different cable rates than they do. Cable operator marketing efforts become cumbersome and perplexing. Meanwhile, DBS and other cable competitors freely price and market their services unregulated by the Commission. This situation is unfair to both cable operators and consumers.

Accordingly, the Commission proposes to permit cable operators to establish uniform rates for uniform cable services provided over multiple franchise areas. Time Warner agrees with the Commission, and offers suggestions on how rate uniformity should be implemented.

The Commission has proposed two alternative methodologies. Under the first alternative, all basic rates would be reduced to the lowest basic rate offered in any community. Under the second approach, basic and cable programming service rates would be averaged on a revenue-neutral, subscriber weighted basis. Time Warner believes that cable operators should have the option to choose either alternative on a system-by-system basis. Such flexibility is needed, because each cable system may face unique circumstances.

Time Warner also agrees with the Commission that cable operators should be able "to itemize and charge for franchise-related costs outside the uniform rate-setting formula." Due to the differences in franchise-related costs between cable communities, there is no other way

to achieve rate uniformity throughout a cable system or group of systems. Subscribers must be able to see a uniform rate for uniform cable services throughout the different franchise areas, in addition to the specific franchise-related costs imposed their community.

Additionally, cable operators must be afforded the right to publicize their uniform rate structure. Section 76.946 of the Commission rules can be read to force cable operators to advertise either a range of cumulative rates or a range of "fee plus" rates. Time Warner urges the Commission to confirm that Section 76.946 permits cable operators to advertise their uniform rates with a notation that other fees and charges may apply. This is standard practice in the telecommunications industry.

Cable operators should also have the flexibility to establish uniform rates for any reasonably proximate systems with comparable lineups. This would reduce subscriber confusion and increase cable operator efficiency and competitiveness. A more narrow geographic restriction might not cover the unique circumstances faced by each cable system. However, where a cable operator undertakes a node-by-node upgrade, the operator should be able to temporarily offer two uniform rate structures, one in the upgraded areas and one in the areas not yet upgraded, until the operator completes the upgrade.

Cable operators should be allowed to restructure the channel lineups of neighboring systems, in a revenue-neutral fashion, to provide uniformity. Cable systems should also be permitted to charge uniform rates even where, due to circumstances beyond their control, the channel lineups differ between such systems, either in number or type of channels.

Certain procedural adjustments are also necessary. Time Warner agrees with the Commission's proposal that a cable operator's initial adoption of uniform rates be allowed to

take effect automatically after 30-days notice. Similar procedures could be applied to annual adjustments to uniform rates. The Commission should also require that BST rate appeals be consolidated as to different communities served by an operator with uniform rates.

Furthermore, any BST rate order as to a system that provides uniform rates should be automatically stayed until all relevant LFAs have reviewed the operator's BST rate adjustments. Time Warner also agrees with the Commission that cable operators should be free to offer uniform rates in unregulated as well as regulated franchise areas.

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COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner") respectfully submits these Comments in response to the Commission's Notice of Proposed Rulemaking released November 29, 1995.^{1/} Time Warner, a division of Time Warner Entertainment Company, L.P., operates cable television systems throughout the country. In the Notice, the Commission proposes to implement an optional rate-setting methodology under which a cable operator could establish uniform rates for uniform cable service tiers offered in multiple franchise areas.^{2/} Time Warner applauds the Commission's effort to permit cable operators serving multiple franchise areas to establish uniform rates for cable services provided to neighboring communities. This flexibility to establish uniform rates should apply to all rates which are potentially subject to regulation, whether basic service tier ("BST"), cable programming service tier ("CPST") or equipment rates.

^{1/}Notice of Proposed Rulemaking, CS Docket No. 95-174, FCC 95-472 (released November 29, 1995) ("Notice").

^{2/}Id. at ¶ 1.

As the Commission observes in the Notice,

[u]nder the Commission's cable service rate regulations, a cable operator serving multiple franchise areas must establish maximum permitted service rates in each franchise area. These rates often vary from franchise area to franchise area, even if each area receives the identical package of program services. This outcome may cause needless confusion for subscribers, as well as unnecessary administrative burdens for cable companies. In addition, a cable operator's ability to market its product on a regional basis may be hindered.^{3/}

The problem that the Notice seeks to address stems from two basic factors. First, pursuant to the Commission's rules and its 1200 series forms, cable operators must set rates based on a variety of variables, including the number of subscribers in the community, number of subscribers per tier, and census income level.^{4/} Accordingly, the rates in two communities served by the same cable system, as calculated pursuant to the 1200 series forms, are rarely the same. The consumer confusion which has resulted from non-uniform rates is demonstrated by the following excerpt from a recent Charlotte Observer news article, which describes the desire of local authorities to achieve uniform rates in the Charlotte area after Time Warner acquired control of Vision Cable's nearby Mecklenburg County system:

We wanted equalized rates and services between Cablevision [Time Warner's system which serves the City of Charlotte] and Vision Cable [Time Warner's recently acquired cable system, which serves surrounding Mecklenburg County], said city Cable Administrator Doris Boris. 'Some people were getting some channels and not others, and rates were different, and you

^{3/}Id.

^{4/}FCC Form 1200.

couldn't understand why the guy across the street had a totally different setup.^{5/}

Other examples of the enormous confusion caused by non-uniform rates are attached as Exhibit A. These rate grids for two Time Warner cable systems illustrate that cable operators' lack of ability to charge uniform rates results in massive subscriber confusion. In the first rate schedule, there are 34 communities served by the system, and the system charges 15 different basic rates (ranging from \$8.76 to \$10.48) and 10 different CPST rates (ranging from \$12.04 to \$14.02). Similarly, in the second system, as of August 1, 1995, there were 11 communities served by the system, and the system charged 10 different basic rates (ranging from \$11.16 to \$11.75) and 10 different CPST rates (ranging from \$11.18 to \$11.71). In both situations, the number of channels is identical in all communities served by each system, although the actual content of certain channels may vary due to differing public, educational and government ("PEG") access obligations or other requirements unique to a particular community. Moreover, the rates have been established in accordance with the Commission's benchmark methodology. Nevertheless, subscriber rates vary dramatically among neighboring communities for the receipt of comparable packages of cable programming. The foregoing examples are not unique -- this diversity of rates is repeated to varying degrees in many Time Warner systems which serve multiple communities from a common headend. Similarly, several nearby, stand-alone systems often have comparable line-ups but divergent rates. Clearly, in all such cases, if the cable operator is permitted to

^{5/}Kay McFadden, "New Cable Channels, Rates Coming," Charlotte Observer, December 21, 1995 at 17A.

charge uniform rates, each community served by the system could be charged the same rate for comparable service packages, thus drastically reducing subscriber confusion.

The second factor which causes non-uniformity of cable rates across a cable system is that each local cable franchising authority ("LFA") served by a single cable system typically imposes different franchise-related costs (such as PEG access support payments) upon the cable operator. The approach advocated by the Commission to address this problem, i.e., permitting cable operators to set uniform rates over multiple franchise areas, and to itemize franchise-related costs, over and above the uniform programming service rates, will minimize subscriber confusion, permit cable operators to respond to competition and maximize administrative ease for LFAs.

At the same time that cable operators are hindered by problems caused by non-uniform rate structures in marketing their service across geographic regions, cable's competitors are able to offer simple, uniform rates. For example, direct broadcast satellite ("DBS") providers are making competitive inroads due in no small part to the fact that they are unregulated and can offer nationwide uniform rates. This dramatically increases the efficiency of their nationwide marketing efforts, and drastically reduces consumer confusion. Not surprisingly, therefore,

Stanley E. Hubbard II, president/COO of United States Satellite Broadcasting, said there is no end in sight to the rapid penetration that USSB and DIRECTV are making into the TV marketplace. The dish receivers are selling at a rate of 25,000 a week, he said. Asked to predict total penetration in five to 10

years, he said the low range is 10 million - 15 million and the high range is 25 million - 30 million.^{6/}

In order to compete with such rapid growth by its unregulated competitors, cable operators must be freed from unnecessary restrictions on their marketing abilities.

Accordingly, Time Warner agrees with the Commission's proposal to permit cable operators to charge geographically uniform rates, and offers the following suggestions as to on how such a policy should be structured and implemented:

I. THE UNIFORM RATE SETTING METHODOLOGY SHOULD BE FLEXIBLE

The Commission has proposed two alternative methodologies for computing uniform rates. Under the first approach, all basic rates would be reduced to the lowest basic rate offered in any community. The difference would be made up through revenue-neutral adjustments to the CPST. Under the second approach, BST and CPST rates would be averaged, on a revenue-neutral, subscriber weighted basis.

Time Warner believes that cable operators should have the option to choose either rate-setting methodology on a case-by-case basis, depending on the unique characteristics of the cable systems in question. In addressing the issue of whether cable operators should be allowed to establish uniform rates in unregulated as well as regulated franchise areas, the Commission stated that allowing such uniform rates "further enhances operators' flexibility in establishing uniform rates."^{7/} Time Warner agrees with the Commission's goal of maximum flexibility, and believes that such goal would be furthered by giving cable

^{6/}Harry A. Jessell, "Superpanel III," Broadcasting & Cable, October 2, 1995 at 17-18.

^{7/}Notice at ¶ 17.

maximum flexibility, and believes that such goal would be furthered by giving cable operators the option to choose the rate-setting methodology that best suits the needs of the communities involved.

II. ITEMIZATION OF FRANCHISE-RELATED COSTS

As the Commission recognizes,

costs associated with PEG channels and other franchise-related costs may vary among franchise areas. A disparity in rates among franchise areas will occur even if the operator provides service to multiple franchise areas through a single, integrated cable system, since even in that case rates are set separately for each franchise area on the basis of variables specific to the franchise area.^{8/}

Accordingly, the Commission suggests that it should "permit the cable operator simply to itemize and charge for franchise-related costs outside the uniform rate-setting formula."^{9/}

The problem cited by the Commission, *i.e.*, a disparity in rates among franchise areas due to differing franchise-related costs, has been encountered by numerous Time Warner cable systems. For example, one Time Warner cable system serves 16 separate communities from a single, technically integrated physical plant. One of these communities has imposed PEG access related obligations on Time Warner which amount to 33 cents per subscriber per month, over and above the 5% franchise fee. This particular community also requires that four channels be designated for PEG access purposes. The remaining 15 communities served by this system have determined that cable-related needs and interests of their residents are

^{8/}*Id.* at ¶ 10.

^{9/}*Id.*

communities receive other programming services on the four channels which are dedicated to PEG access in the first community.^{10/}

Another Time Warner system serves a total of 54 separate franchises. While each community imposes a franchise fee, the amount ranges from 3% to 5% of gross revenues. Five of these communities impose special PEG access related costs ranging from 75 cents to 96 cents per subscriber per month, while the remaining communities have elected to impose no such costs on their residents. A third Time Warner cable system serves 18 separate communities. One LFA imposes PEG access related costs of \$1.26 per subscriber per month; none of the other communities served by this system have chosen to mandate any such costs. Again, the foregoing examples are merely illustrative. It is not at all uncommon for such franchise-related costs to vary dramatically among various communities served by a single, technically integrated cable system.

There is no way to achieve regional rate uniformity unless these differing franchise-related costs can be isolated from the uniformity calculation and then added back as an itemized amount in each relevant community. Moreover, this approach would reduce subscriber confusion, because subscriber bills throughout the cable system would contain uniform basic and CPST rates, and only franchise-related costs, which would be clearly itemized, would differ. This is preferable to the current situation, where the basic and CPST rates themselves differ, and subscribers have no idea why. Accordingly, Time Warner

^{10/} Two of these communities do require one channel dedicated to PEG access, but do not impose monetary PEG access support obligations above the franchise fee.

endorses the Commission's proposal "to permit the cable operator simply to itemize and charge for franchise-related costs outside the uniform rate-setting formula."^{11/}

The 1992 Cable Act clearly permits such itemization. Section 622(c) of the Act expressly authorizes cable operators to itemize on subscriber bills the amount (1) of the total bill assessed as a franchise fee (and the identity of the franchising authority), (2) of the total bill assessed to satisfy any franchising authority imposed PEG access requirements, and (3) "of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber."^{12/} The Commission has reiterated this point numerous times.^{13/}

Since different communities impose different franchise obligations, residents in communities that impose fewer such obligations should not suffer rate increases in order for the total rate to match other communities which have elected to impose greater franchise obligations. In other words, Time Warner agrees with the Commission that franchise-specific costs should not be shifted from one community to another.^{14/} Rather, the residents of communities which have exercised restraint in the imposition of franchise-related

^{11/}Notice at ¶ 24.

^{12/}47 U.S.C. § 5429(c).

^{13/}See Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993), at ¶ 254; Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316 (1994), at ¶ 144; Public Notice, Questions and Answers on Cable Rate Regulation, Question No. 13 (released April 26, 1994) (itemization of franchise fee); United Artists Cable of Baltimore, DA 95-737, 10 FCC Rcd 7250 (1995), at ¶ 6 (itemization of franchise fee).

^{14/}See Notice at ¶ 24.

costs should be able to enjoy the savings related to such lower franchise obligations. As the Commission recognizes, the only way they can do so, and not be forced to subsidize higher franchise-specific costs in other communities, is for the cable operator to calculate a uniform rate net of such franchise costs, and to itemize the costs as a separate line item on the subscriber's cable bill.^{15/} This flexibility will result in the greatest consumer satisfaction, and the least subscriber confusion.

III. ADVERTISING AND MARKETING UNIFORM RATES.

As indicated, Time Warner agrees that the Commission's current rules, which frequently force cable operators to charge dissimilar rates for similar services, create unnecessary subscriber confusion and administrative burdens and hinder regional marketing efforts in an increasingly competitive environment. However, adopting new rules that allow cable operators to set uniform rates across franchise areas will not, in and of itself, solve these problems; cable operators also have to be assured the right to publicize their uniform rate structures in their advertising and marketing materials.

Unfortunately, Section 76.946 of the Commission's rules can be construed to severely restrict the ability of cable operators to advertise regionally uniform rates. According to that provision, cable operators advertising rates for multiple franchise areas might be required to include specific information regarding varying franchise fee and other governmentally-

^{15/}Id.

imposed costs, even where the underlying service rates are identical.^{16/} Thus, if a cable operator establishes a uniform service rate of \$14.00, with franchise fee or other governmentally-imposed costs varying by community from \$0.28 to \$0.70, the cable operator's advertising either might indicate a range of cumulative rates ("\$14.28 to \$14.70 depending on location") or a range of "fee plus" rates ("\$14.00 plus additional charges of \$0.28 to \$0.70 depending on location").

Both of these approaches are unduly restrictive. Indeed, advertising rates on a cumulative basis effectively negates the benefits which would otherwise flow from the establishment of uniform rates. And even the "fee plus" approach prevents the benefits of uniform rate setting from being fully achieved. For example, advertising a specific range of additional fees is more apt to confuse than enlighten customers, who will have no way of knowing the specific fees (if any) applicable in their franchise areas. In addition, the current "fee plus" rule creates the risk that a cable operator will have to revamp all of its regional advertising and marketing materials whenever the applicable range of governmentally-imposed fees and charges changes, even though the underlying service rate is unaltered and the change in the additional fee affects only a small portion of the geographic area to which the marketing and advertising materials apply.^{17/}

^{16/}See also Third Order on Reconsideration, MM Docket No. 92-266, 9 FCC Rcd 4316, 4368 n.99 (1994); Thirteenth Order on Reconsideration, MM Docket No. 92-266, FCC 95-397, 60 FR 52106 (October 5, 1995) at ¶¶ 142-43.

^{17/}It is worth noting that, in the recently-enacted Telecommunications Act of 1996, S. Rep. No. 458, 104th Cong., 2d Sess. (1996), Congress recognized the need to reduce the administrative burdens that result from changes in governmentally-mandated fees on cable services. See Section 301(g) (amending the 1992 Cable Act to exempt cable operators from
(continued...)

Time Warner submits that the benefits of the Commission's uniform rate setting proposals can best be accomplished, without any risk to consumers, by a more general "fee plus" approach to regional advertising. Under such an approach, cable operators would be permitted to advertise their uniform service rate together with a notation notifying potential subscribers that other fees and charges may apply and advising consumers to contact the cable operator for more information regarding the exact amount of any such incidental fees in their particular community.^{18/} This approach will facilitate efficient regional marketing and will minimize the risk of subscriber confusion. Indeed, subscribers are quite accustomed to and comfortable with marketing techniques in which goods and services are advertised exclusive of applicable taxes, shipping and handling charges, or other incidental fees. In this regard, Time Warner has attached examples of advertisements for regulated telecommunications service which utilize a general "fee plus" approach.^{19/} These advertisements include:

- A C&P Telephone advertisement for "Answer Call" service, indicating that "[a]ll rates and charges are for residential service, are before taxes, if applicable, and are subject to change."

^{17/}(...continued)

the obligation of providing advance notice to subscribers of rate changes resulting from any regulatory fee or other governmentally-imposed charge on the transaction between a cable operator and a subscriber).

^{18/}As a further protection, the Commission could require that, upon request, cable operators provide consumers with community-specific price information in writing.

^{19/}See Exhibit B hereto.

- A Sprint advertisement for "30 free minutes of long distance," qualified by the following fine print:

Credit is equal to up to 30 minutes long-distance calling per account based on 3,000 mile night/weekend rate. Credit issued on first full-month's bill. In addition to the 9 cent rate, surcharges apply to FONCARD calls. The 9 cent rate applies to domestic calls only. Operator-assisted calls do not apply. IntraLATA usage where authorized. Offer good for new customers only.

- A Circuit City cellular phone advertisement from the February 9, 1996 Washington Post indicating that:

Prices may vary depending on carrier rate plan selected. Certain cellular telephone company fees and restrictions may apply in connection with service activation. Certain Circuit City fees may apply in connection with equipment purchase. New service activation through Circuit City for minimum period required. Price will be higher without activation through Circuit City authorized cellular telephone company.* Offer available on new activations only. Requires a 12 month service agreement with Bell Atlantic NYNEX Mobile on select rate plans. Activation, access, toll, roam, long distance, landline fees not included. Certain restrictions may apply. Monthly access, toll, roam, landline and long distance fees not included.

- A Bell Atlantic NYNEX Mobile advertisement from the February 9, 1996 Washington Post that reads:

Two year service contract required with Bell Atlantic NYNEX Mobile, \$17.99 per month with a one year service contract. Airtime is 35¢ per minute in-zone, and 90¢ per minute in the MobileReach Network. Toll, long distance, landline and roaming charges not included.

- A Cellular One advertisement from the February 9, 1996 Washington Post that reads:

Not available on certain rate plans. Long distance, interconnect, roamer administration, early termination and other fees and restrictions apply. . . . Rates will vary with contract terms and equipment.

Time Warner urges the Commission to clarify Section 76.946 of its rules expressly to allow similar advertising and marketing techniques to be employed by the cable industry.^{20/} For example, cable advertising and marketing materials should be allowed to specify a schedule of programming service package rates, exclusive of franchise fees, taxes and other franchise-related costs, so long as a legend along the following lines is included:

Rates are exclusive of governmental fees, taxes and other franchise-related costs. Any such amounts will be clearly itemized on monthly bills. You may contact your cable operator to determine the exact amount of any such incidental fees applicable to your service area.

IV. CABLE OPERATORS SHOULD HAVE FLEXIBILITY TO ESTABLISH UNIFORM RATES FOR ANY REASONABLY PROXIMATE SYSTEMS WITH COMPARABLE LINE-UPS

As the Commission states in the Notice, "the acquisition and clustering of neighboring cable systems by MSOs has become fairly common."^{21/} Time Warner has undertaken a significant amount of clustering, especially in large, urban areas. As the Commission recognizes, there are substantial benefits to Time Warner, its subscribers, and the relevant franchising authorities in allowing Time Warner to establish uniform services at uniform rates in such areas. These include reducing subscriber confusion and greater ability to respond to competitive offerings.^{22/} Thus, the Commission seeks comment on whether the

^{20/}Time Warner notes that the current "fee plus" approach may raise an issue under the First Amendment in that it appears to unduly restrict truthful commercial advertising. See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); Board of Trustees of State Univ. v. Fox, 492 U.S. 469, 480 (1989).

^{21/}Notice at ¶ 11.

^{22/}Id. at ¶ 12.

ADI in which a particular cable system is located is an appropriate geographic region in which to allow uniform rate setting.^{23/}

Time Warner urges the Commission to grant cable operators the flexibility to establish uniform rates for any reasonably proximate systems with comparable channel line-ups. While any such systems are likely to be located within the same ADI in most instances, there are many unique circumstances that cannot now be anticipated. For example, a single, technically integrated cable system might cross an ADI boundary. Likewise, a cable operator might operate more than one cable system per ADI, and such systems may not be appropriate candidates for rate uniformity due to material differences in channel capacity, programming line-ups, etc. Thus, Time Warner agrees with the Commission that

under a uniform rate-setting option, a cable operator [should] be allowed to establish uniform rates for uniform service offerings in multiple franchise areas regardless of whether the operator serves the multiple franchise areas with one integrated cable system (i.e., one 'headend') or with multiple separate cable systems.^{24/}

One situation, however, warrants separate treatment. This is the situation where a cable operator undertakes a node-by-node upgrade. Where one node is upgraded and the cable operator needs to increase its rates accordingly,^{25/} the operator should not be forced

^{23/}Id. at ¶ 14.

^{24/}Id. at ¶ 13.

^{25/}Under the Commission's "going forward" rules, cable operators are permitted to raise rates for each channel added to regulated tiers (i.e., BST or CPST), whether in connection with an upgrade or otherwise. See 47 C.F.R. § 76.922(e). For CPST rates, Time Warner's systems are covered by a Social Contract, which permits annual CPST increases of \$1 during the five-year term of the Social Contract in connection with upgrades agreed to in the Social
(continued...)

to raise its rates everywhere in the name of uniformity. Rather, the operator should be able to temporarily offer two uniform rate structures -- one in the upgraded areas, and the other in the areas that have not yet been upgraded. As the cable operator completes the upgrade, each upgraded node would have its rates adjusted accordingly, to the upgraded uniform rate.

In addition, in certain situations, cable operators will need flexibility to establish greater uniformity of channel line-ups and service packages as a prerequisite to the implementation of geographic rate uniformity. Time Warner suggests that, as an incentive to provide subscribers with the benefits of geographic rate uniformity "as expeditiously as possible,"^{26/} cable operators should be allowed to restructure the channel line-ups of neighboring systems so as to provide greater uniformity. Such restructuring should be implemented in a revenue neutral fashion, similar to the approach followed by the Commission when rate regulation was initially implemented in September of 1993. Accordingly, such restructuring would not be subject to the "residual shift" approach under the Form 1200 series forms, but could be reviewed by the LFA or the Commission, as appropriate, to ensure that revenue neutrality has been maintained. Similarly, where a neighboring system is acquired and is offering rate and service packages which do not comport with those offered by the buyer, the buyer should simply be allowed to "cut over"

^{25/}(...continued)

Contract, in addition to ordinary external cost adjustments. See Social Contract for Time Warner, Memorandum Opinion and Order, FCC 95-478 (released Nov. 30, 1995), at ¶¶ 25-26. Time Warner is also permitted under the Social Contract to establish a blended average regional rate for certain equipment basket categories. Id. at ¶ 37.

^{26/}Notice at ¶22.

to the uniform rate and service offerings provided by the buyer's system upon consolidation of management and operations.

In some cases, cable operators may not be able to achieve precise channel line-up uniformity due to circumstances beyond their control. For example, one franchising authority in a system might require more PEG access channels than another franchising authority served by that system.^{27/} Similarly, a cable system could be partially located in two different ADIs, each with different must-carry stations. In both cases, "[t]his could result in a cable system having a non-uniform channel line-up within franchise areas where it seeks to establish uniform rates."^{28/} However, the cable operator should not be restricted from instituting uniform rates because of such circumstances which are outside its control.

Likewise, if a cable system offers the same number of channels in different communities, but different programming on certain channels, the cable operator should nevertheless be able to establish uniform rates, so long as the operator can demonstrate that the aggregate programming costs of the programming carried in each community do not vary by more than some de minimis amount, such as ten percent. So long as programming costs are comparable, content should be irrelevant. Otherwise, the Commission would be placed in the position of judging the value of the content of different programming services, in violation of the Commission's policy not to involve itself in such content evaluation.^{29/}

^{27/}See id. at ¶ 23.

^{28/}Id.

^{29/}See e.g., Time Warner Cable, Memorandum Opinion and Order, CSR-4231-P, 9 FCC Rcd 3221 (1994), at ¶ 42 ("we do not believe that it is appropriate to evaluate the content of
(continued...)

V. PROCEDURAL ADJUSTMENTS NECESSARY TO INSTITUTE RATE UNIFORMITY

As the Commission recognizes at paragraph 22 of the Notice, certain procedural adjustments, *e.g.*, relating to timing, will be required for consumers to benefit from the establishment of uniform rates "as expeditiously as possible." Time Warner concurs with the Commission's analysis that cable operators electing to implement uniform rates should not be subject to the vagaries of "multiple local tolling orders of varying durations" which would "complicate implementation of uniform BST rates." Accordingly, Time Warner agrees with the Commission's proposal that a cable operator's initial adoption of uniform rates be allowed to take effect automatically after giving the requisite 30-days advance notice to subscribers and franchising authorities.

Such initiation of uniform rates would not be subject to tolling by franchising authorities. However, certified franchising authorities would not be deprived of their opportunity to review BST rate increases. For example, the Commission could employ procedures analogous to those adopted in the Thirteenth Reconsideration Order, *i.e.*, LFAs would be allowed to issue an order challenging any increase to BST rates within 90 days after the cable operator implements uniform rates. After the expiration of 90 days, the

²⁹(...continued)

a programming service that is seeking approval of exclusive distribution by cable operators"); Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993) at ¶ 38, n.55 (Commission establishes "content-neutral test" for program comparability under 1992 Cable Act "effective competition" definition, based on number of channels offered rather than content of channels, in order to avoid "comparing the quality and content of programming offered by the competing service") (footnote omitted).

operator could inquire as to whether any LFA is still reviewing the adjustments. If so, the LFA would have up to 12 months after implementation to issue a rate order.

Similar procedures could be applied to each annual adjustment to uniform rates thereafter, assuming the operator has elected the Form 1240 methodology.^{30/} Of course, such subsequent adjustments would require 90 days' advance notice to LFAs pursuant to Sec. 76.933(g) of the Commission's rules, although the tolling procedures provided for therein would not apply. Rather, operators would be allowed to implement annual adjustments to uniform rates at the expiration of the 90-day period, even if one or more LFAs has issued a rate order challenging that rate during such period. Subscribers would be fully protected through the FCC's refund process and through the Form 1240 methodology which requires any prior overcharges to be trued-up in the following year.

Certain adjustments would also be necessary to the BST rate appeal process in order to assure that rate uniformity is maintained. Most significantly, the Commission should require that any appeals be consolidated with respect to BST rates applicable to different communities served by an operator who has elected to implement rate uniformity. Not only will consolidation of appeals ensure that consistent decisions are rendered as to each affected community, thereby maintaining rate uniformity, but administrative burdens on the Commission will be substantially reduced because it will be required to review a cable operator's rate justification filing only once in order to address numerous consolidated appeals.

^{30/} Under its Social Contract, Time Warner has agreed to adopt the Form 1240 annual adjustment methodology. Accordingly, the mechanics of rate uniformity for systems using Form 1210 is not addressed herein.

operator's rate justification filing only once in order to address numerous consolidated appeals.

In order to facilitate consolidation of appeals, the Commission should provide that any BST rate order adopted by a community served by a system which has implemented uniform rates be automatically stayed until all relevant LFAs have completed their review of the operator's BST rate adjustments. Otherwise, an operator may be required to pay refunds and implement prospective rate reductions at different times in different communities, which would of course eliminate rate uniformity. After all LFAs have completed their BST rate review, however, the operator can file a single consolidated appeal, and any ultimate decision will apply to all affected communities simultaneously, thus preserving rate uniformity.

The Notice also discusses the effect of the Commission's uniform rate setting approach on regulated and unregulated franchise areas.^{31/} The Commission "propose[s] that operators be free to establish uniform rates under the uniform rate-setting approach in unregulated as well as regulated franchise areas for purposes of uniformity."^{32/} Time Warner agrees. However, the Notice raises the issue of how cable systems should be treated where a formerly unregulated community becomes regulated. According to the Commission,

[a]n operator later becoming subject to regulation would follow our existing procedures for establishing regulated rates, including determining an initial rate pursuant to our benchmark

^{31/}Notice at ¶ 17.

^{32/}Id.

formula or cost-of-service rules, and seeking the approval of rates from the local franchising authority.^{33/}

The Commission's reasoning is that

uniform rates calculated pursuant to the method ultimately adopted in this proceeding, and charged in unregulated areas, should increase an operator's regulatory certainty with respect to whether the subscriber rates charged in the unregulated areas are reasonable under our rules should the operator later become subject to rate regulation in one of those areas.^{34/}

Time Warner suggests that in situations where a cable operator has elected to institute uniform rates, a subsequent decision by a formerly unregulated community to exercise rate regulation authority should not be allowed to override the benefits to the public of rate uniformity. Thus, the operator should be allowed to complete its initial Form 1200 in such situations using aggregate, system wide data. This will likely produce maximum permitted rates which do not suffer from the anomalies in the Form 1200 methodology resulting from the use of community specific data. If the maximum permitted rates resulting from this calculation are above the operators current uniform rates, then the existing rates would be approved. If the maximum permitted rates are below the current uniform rates, any discrepancies could be trued-up in the next annual rate filing, thus ensuring that uniform rates are maintained.

^{33/}Id. at n.30.

^{34/}Id. at ¶ 17.